3-6-2017

State v. Capone Respondent's Brief Dckt. 43124

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 43124**
Plaintiff-Respondent,	)	
	)	**Latah Co. Case No.**
vs.	)	**CR-2013-1358**
	)	
CHARLES ANTHONY CAPONE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

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STATEMENT OF THE CASE

Nature of the Case

Charles Anthony Capone appeals from the judgment entered upon the jury verdict finding him guilty of first degree murder, failure to notify coroner or law enforcement of death, conspiracy to commit failure to notify coroner or law enforcement of death and a persistent violator enhancement.

Statement of Facts and Course of Proceedings

Capone and Rachael Anderson started dating in February 2009 and were married in September 2009. (9/2/14 Tr., p. 846, Ls. 1-21.) On or around December 27, 2009, Rachael reported to the Clarkston Police Department that Capone choked and attacked her. (9/2/14 Tr., p. 908, L. 15 – p. 909, L. 9; 9/4/14 Tr., p. 1187, L. 9 – p. 1188, L. 14.) Rachael then left Capone and filed for divorce. (9/2/14 Tr., p. 846, L. 22 – p. 847, L. 5, p. 936, Ls. 9-24; 9/5/14 Tr., p. 1359, L. 10 – p. 1361, L. 6; Ex. 73.) The earliest the divorce could be finalized was on or around April 12, 2010. (9/5/14 Tr., p. 1363, L. 22 – p. 1364, L. 14.) Capone did not want a divorce. (9/3/14 Tr., p. 1004, L. 15 – p. 1006, L. 16.) After Rachael filed for divorce, Robert Bogden, a friend of Capone's, became concerned that Capone would do something dangerous. (9/3/14 Tr., p. 1079, L. 8 – p. 1080, L. 8.)

After Rachael left Capone, Rachael started receiving strange calls multiple times a day. (9/2/14 Tr., p. 847, L. 8 – p. 856, L. 6; 9/3/14, p. 978, L. 15 – p. 979, L. 4, Tr., p. 1009, L. 17 – p. 1010, L. 3; Ex. 4.) The voice on the phone calls was artificially distorted. (Id.) Rachael played some of the harassing phone

messages to her younger sister, Kristina Bonefield. (9/2/14 Tr., p. 965, L. 1 – p. 966, L. 15, 9/3/14 Tr., p. 972, L. 14 – p. 974, L. 3; Exs. 4, 149.) Ms. Bonefield described the voice on the phone messages as:

> Distorted, like not a human voice, like something from a movie almost, like scary. Like, it scared me. I didn't – I told her I didn't want to hear it anymore; that it had scared me, like – not like you or I would talk, like distorted, you know, an evil voice.

(9/2/14 Tr., p. 965, Ls. 3-10.) The calls were made using a service called "Spoof.com" which could change the voice of the caller and hide the phone number of the caller. (See 9/4/14 Tr., p. 1185, L. 10 – p. 1186, L. 21.)

Rachael also received anonymous emails with pictures of mutilated bodies from old unsolved murder cases. (9/3/14 Tr., p. 1057, L. 12 – p. 1058, L. 6.) She began to sleep with the lights on and started keeping a loaded gun in her house. (9/2/14 Tr., p. 855, L. 23 – p. 857, L. 19.)

Rachael's car, a white Dodge, was repeatedly vandalized. (9/2/14 Tr., p. 910, L. 10 – p. 911, L. 23, p. 914, Ls. 15-25, p. 936, L. 25 – p. 939, L. 23; 9/3/14 Tr., p. 976, L. 22 – p. 978, L. 1; Ex. 29.) Her car tire was slashed, her oil filter loosened, and the back window broken out. (9/2/14 Tr., p. 910, L. 10 – p. 911, L. 23, p. 941, L. 12 – p. 942, L. 10; 9/3/14 Tr., p. 1010, L. 4 – p. 1013, L. 1.) For a time, Rachael was not sure who was stalking and harassing her. (9/4/14 Tr., p. 1185, L. 10 – p. 1186, L. 3.) Captain Hally of the Asotin County Sheriff's Office met with Rachael on April 13, 2010. (9/4/14 Tr., p. 1170, Ls. 10-18.) Rachael was "scared, frightened, upset and very concerned for her safety." (Id.)

Capone owned and operated a car repair shop called Palouse Multiple Services or "PMS" in Moscow, Idaho. (9/4/14 Tr., p. 1180, L. 5 – p. 1181, L. 11;

Ex. 29.) After Rachael's car was vandalized she took it to Capone's auto shop to get it fixed. (9/3/14 Tr., p. 1064, L. 22 – p. 1065, L. 18.) Capone lent Rachael a white Yukon to drive while her car was being fixed. (9/3/14 Tr., p. 1097, L. 25 – p. 1100, L. 3, p. 1122, Ls. 6-20, p. 1191, Ls. 5-10.) The white Yukon belonged to Mr. Bogden. (Id.)

When Rachael told her friend, J.D. Rogers, that she was taking her car to Capone's shop to get it repaired, he told Rachael that she should not go by herself. (9/3/14 Tr. p. 1063, L. 20 – p. 1066, L. 11.)

That week, Capone told Rachael that she had three days to decide whether to stay married to him or get divorced. (9/3/14 Tr., p. 1017, L. 20 – p. 1019, L. 6.) Capone wanted to meet with Rachael again on Friday, April 16, 2010, so she could give him her final answer. (Id.)

On April 16, 2010 Rachael went to Capone's car shop. (9/4/14 Tr., p. 1189, L. 4 – p. 1191, L. 4.) When Rachael arrived, she was upset that her car was not yet fixed. (Id.) Rachael then left Capone's shop to buy a computer at Office Depot. (Id.) Capone gave her his debit card to use. (Id.) Rachael went into Office Depot a little after 6:00 p.m., stayed 20-30 minutes, but left with a computer. (9/4/14 Tr., p. 1261, L. 11 – p. 1264, L. 25, p. 1269, Ls. 11-21.)

Rachael then stopped by the Third Street Market and purchased a pack of Grolsch beer using Capone's debit card. (9/4/14 Tr., p. 1191, L. 14 – p. 1193, L. 25; Ex. 10.) The receipt showed the purchase occurred at 7:07 p.m. (9/8/14 Tr., p. 1615, L. 7 – p. 1619, L. 1; Ex. 136.) She then returned to Capone's shop. (9/4/14 Tr., p. 1191, L. 14 – p. 1193, L. 25; Ex. 10.)

David Stone, an old friend of Capone's, was at Capone's shop because Capone was going to work on Mr. Stone's car, a Dodge Durango. (9/9/14 Tr., p. 1742, L. 5 – p. 1743, L. 22, p. 1759, Ls. 7-22.) When Rachael returned to Capone's shop, Capone drank some of the beer Rachael had purchased. (9/9/14 Tr., p. 1773, L. 16 – p. 1775, L. 11.) Later in the evening, Capone finished working on Rachael's car. (9/9/14 Tr., p. 1775, L. 18 – p. 1778, L. 20.) Capone pulled Rachael's car out of the garage, and Mr. Stone had to drive his car around and back into Capone's shop. (Id.)

After Mr. Stone pulled his car into Capone's shop, Mr. Stone heard a noise, like a thud or a bang. (9/9/14 Tr., p. 1778, L. 21 – p. 1782, L. 9.) Mr. Stone walked around to see what was taking so long and he saw Rachael on the ground and Capone straddling and strangling her. (Id.) Rachael was not moving. (Id.) There was no sound. (Id.) Capone was wearing black shop gloves. (9/9/14 Tr., p. 1782, L. 12 – p. 1784, L. 1.)

Capone did not hear Mr. Stone walk up, so when Mr. Stone asked him what was going on, it startled Capone. (9/9/14 Tr., p. 1782, Ls. 10-25.) Capone told Mr. Stone that they were in this together and told him he knew where his family lived. (Id.) Capone and Mr. Stone opened the back of Mr. Stone's Durango, put the seats down, and laid down cardboard in the back. (9/9/14 Tr., p. 1788, L. 20 – p. 1791, L. 19.) They then put Rachael's body on top of the cardboard in the Durango and put some more cardboard and bags on top of her. (Id.) After they closed the hatch to the Durango, Capone cleaned out the Yukon that Rachael had been driving. (9/9/14 Tr., p. 1793, L. 20 – p. 1795, L. 7.)

Capone was still wearing the gloves. (Id.) Capone then took up Rachael's purse off the ground and put it in the Yukon. (Id.) Capone locked the shop and told Mr. Stone to follow him. (9/9/14 Tr., p. 1797, L. 22 – p. 1801, L. 1; Exs. 21-23, 127A.) Capone drove the Yukon to the Dyna Mart and parked it in back of the Dyna Mart. (9/9/14 Tr., p. 1797, L. 22 – p. 1801, L. 1; Exs. 21-23, 127A.) On the way back to Capone's shop, Capone was quiet, but he told Mr. Stone that everything was going to be okay if he kept his mouth shut. (9/9/14 Tr., p. 1801, L. 23 – p. 1803, L. 17.) Capone instructed Mr. Stone to get a chain. (9/9/14 Tr., p. 1803, L. 18 – p. 1804, L. 24.)

Mr. Stone eventually obtained a chain and took it back to Capone's shop, where Capone had laid a tarp on the floor near the rear of the Durango. (9/9/14 Tr., p. 1804, L. 25 – p. 1817, L. 16; Exs. 121-124, 139.) Capone got one of the tarps down from the loft. (Id.) They wrapped Rachael in the tarp and tied it with the chain and a nylon-like rope. (9/9/14 Tr., p. 1817, L. 23 – p. 1821, L. 6.)

After Rachael's body was secured in the tarp, Capone and Mr. Stone placed her in the back of the Durango, covered her up, and closed the hatch. (9/9/14 Tr., p. 1821, L. 22 – p. 1822, L. 4.) They drove to Red Wolf Bridge and eventually threw her over the side of the bridge into the river. (9/9/14 Tr., p. 1822, L. 5 – p. 1829, L. 14; Exs. 113, 141.)

When they were finished cleaning the Durango and the shop, Capone told Mr. Stone to meet him at Shari's restaurant for breakfast in the morning. (9/9/14 Tr., p. 1837, L. 1 – p. 1838, L. 8.) At breakfast, Capone reminded Mr. Stone to

keep his mouth shut, and told him that if he kept his mouth shut nobody else needed to get hurt. (9/9/14 Tr., p. 1838, L. 9 – p. 1840, L. 2; Ex. 150.)

Rachael did not show up to work on Saturday or Monday and, over the course of Monday, it became clear that she was missing. (See 9/2/14 Tr., p. 868, L. 14 – p. 869, L. 17; 9/2/14 Tr., p. 918, Ls. 3-21; 9/4/14 Tr., p. 1175, Ls. 9-20.) When Captain Hally learned that Rachael was missing he became very concerned because of their prior conversations. (9/4/14 Tr., p. 1175, L. 11 – p. 1179, L. 3.) Captain Hally contacted AT&T, Rachael's cell phone service provider, and requested an exigent circumstances ping of her cell phone. (Id.) The ping location came back in Nez Perce County, in an area off of Warner Road and Lindsay Creek Road. (Id.) The police were unsuccessful in finding Rachael or her cell phone. (9/4/14 Tr., p. 1179, Ls. 4-15.)

The next day, Tuesday, Ms. Bonefield asked Capone when he last saw Rachael and Capone said she had come by on Friday, April 16, bought some beer with his debit card, and then "ran off with some guy named Vince." (9/3/14 Tr., p. 987, L. 7 – p. 989, L. 3.) There was no "guy named Vince." (Id.)

That same day, Captain Hally interviewed Capone at his car repair shop. Capone admitted that he had been stalking and harassing Rachael, and admitted that he had used Spoof.com to change his voice and hide his phone number. (9/4/14 Tr., p. 1185, L. 10 – p. 1186, L. 21.) Capone also admitted to having a physical altercation with Rachael on December 27, 2009. (9/4/14 Tr., p. 1187, L. 9 – p. 1188, L. 14.) Capone further admitted Rachael had been at his shop on April 16. (9/4/14 Tr., p. 1189, L. 9 – p. 1195, L. 7.) He gave a couple of

different times that she left his shop, but eventually settled on the story that she left around 7:00 p.m. (9/4/14 Tr., p. 1194, L. 20 – p. 1195, L. 7.) According to Capone, Rachael left his shop and went to another computer store, Crazy Computers, but did not return after that. (9/4/14 Tr., p. 1195, Ls. 8-22.) Capone never mentioned Mr. Stone being present at his shop on April 16. (9/4/14 Tr., p. 1196, L. 13 – p. 1197, L. 14.)

Capone told the police they could search his shop and his pickup. (9/4/14 Tr., p. 1203, L. 22 – p. 1205, L. 4.) Lieutenant Fry found a box of black latex gloves in Capone's pickup. (Id.) While the police were at his shop, Capone became agitated and said something along the lines of "it wasn't supposed to turn out like this" and then told the police to leave. (Id.)

The next day, Wednesday, April 21, 2010, Rachael's family and friends were putting up missing person posters when they saw the white Yukon that Rachael had been driving, parked behind the Dyna Mart. (9/2/14 Tr., p. 878, L. 1 – p. 880, L. 5.) Rachael also made it a habit to hide her purse in her car, so Ms. Griswold was surprised to see Rachael's purse sitting in the open in the Yukon. (9/2/14 Tr., p. 880, L. 9 – p. 881, L. 2; Ex. 17.)

Rachael's family continually searched for Rachael, but Capone never helped. (9/2/14 Tr., p. 954, Ls. 8-17; 9/3/14 Tr., p. 987, L. 7 – p. 989, L. 3, p. 1114, Ls. 3-21, p. 1139, Ls. 13-18; 9/4/14 Tr., p. 1239, Ls. 7-15.)

On May 6, 2010, Capone was arrested on federal gun charges. (9/8/14 Tr., p. 1655, Ls. 5-12.) While he was in custody he made several incriminating admissions regarding Rachael to his cellmates, Mr. Glass and Mr. Voss. (See

e.g. 9/5/14 Tr., p. 1427, L. 23 – p. 1432, L. 20, p. 1442, L. 14 – p. 1444, L. 4, p. 1457, Ls. 2-6, p. 1459, L. 21 – p. 1460, L. 13.)

On May 1, 2013, after an investigation, the state charged Capone with first degree murder and related charges. (See R., pp. 128-133, 241-247.) Mr. Stone was also charged. (See R., pp. 304-307.) After a joint preliminary hearing, while the deputies were removing handcuffs and leg irons, Capone turned to Mr. Stone and said, "I don't even know why you're in here." (9/9/14 Tr., p. 1853, L. 21 – p. 1859, L. 6; 9/11/14 Tr., p. 2287, L. 20 – p. 2289, L. 22.) Mr. Stone became emotional and eventually asked to speak to his attorney. (See 9/9/14 Tr., p. 1853, L. 21 – p. 1859, L. 12.) Mr. Stone told his attorney that he needed to do the right thing. (Id.) There was no plea deal offered by the state the first time he spoke to investigators. (Id) Eventually, Mr. Stone entered into a plea agreement with the state in which Mr. Stone agreed to plead guilty to failure to notify law enforcement or coroner of death, and the remaining counts against him were dismissed without prejudice. (R., pp. 442-445.)

The district court granted the state leave to amend the Information based upon the evidence provided by Mr. Stone. (R., pp. 439-445, 448-449). The amended Information charged Capone with first degree murder, failure to notify coroner or law enforcement of death, conspiracy to commit failure to notify coroner or law enforcement of death and the persistent violator enhancement. (R., pp. 450-455, 1620-1622, 1642-1647.)

The state filed a Notice of Intent to use I.R.E. 404(b) evidence, including Capone's harassment and stalking of Rachael, his vandalism of her car, his

attempted strangulation of Rachael, and his prior felony convictions and incarcerations. (R., pp. 456-458.) The state also filed a series of motions in limine. (R., pp. 475-508.) Capone filed a motion in limine to exclude the proposed I.R.E. 404(b) evidence. (R., pp. 509-512.)

The district court held a hearing on the pre-trial motions and entered a written order. (R., pp. 1553-1556, 1571-1574.) The district court deferred ruling on the admissibility of the I.R.E. 404(b) evidence until trial. (R., p. 1556 ("Court stated that the motions in limine in regard to the 404(b) evidence will have to be dealt with at trial.").)

Prior to trial, both the state and Capone proposed jury instructions. (R., pp. 1701-1735, 1750-1756.) Capone did not propose a jury instruction regarding accomplice testimony, nor did Capone object to the lack of such an instruction. (See R., pp. 1750-1756.) At trial, Capone did not object to the final jury instructions. (R., pp. 1964, 1977 – 2019.)

Following a 16 day jury trial (R., pp. 1856-1858, 1861-1868, 1875-1889, 1896-1905, 1912-1922, 1933-1944, 1948-1952, 1955-1970), the jury found Capone guilty of all charges. (9/17/14 Tr., p. 2692, L. 24 – p. 2694, L. 8, p. 2705, L. 19 – p. 2706, L. 5; R., pp. 2020-2022.)

The district court imposed a fixed life sentence for first degree murder, and 20 years fixed for both failure to notify coroner or law enforcement of death and conspiracy to commit failure to notify coroner or law enforcement of death, which are to be served consecutively to each other, but concurrently to the

murder sentence. (R., pp. 2091-2095.) Capone filed a timely Notice of Appeal. (R., pp. 2096-2098.)

While his appeal was pending Capone filed a Motion for New Trial, based upon a report by Deputy Demyer in which he reported that he obtained a statement from a Tyler Beyer who was being booked into jail with a .20 BAC. (See Jan. 7, 2016 Motion for New Trial[1]; Aug. R., pp. 1-7.) Reportedly, in July of 2013, Mr. Stone told Mr. Beyer that "they" would "never find [Rachael's] body in the river because it was not there." (Id.)

The district court denied Capone's motion for a new trial, finding that the statement purportedly made by Mr. Stone to Mr. Beyer was not material and would have been admissible only for the purposes of impeachment. (Aug. R., pp. 29-35.) Further, this statement would not have provided sufficient evidence to change the jury verdict. (Id.) The district court found, "There was substantial evidence presented to the jury which supported the finding of guilt in this matter." (Id.)

[1] The December 13, 2016 Order Granting Motion to Augment the Record, augmented the record with: 1. Motion for New Trial, file-stamped January 7, 2016; 2. Memorandum of Authorities in Support of a Motion for New Trial, with attachment, file-stamped January 7, 2016; 3. State's Response to "Motion for a New Trial," with attachments, file-stamped January 21, 2016; and 4. Opinion and Order on Defendant's Motion for a New Trial, file-stamped May 10, 2016.

ISSUES

Capone states the issues on appeal as:

I. WHETHER THE GUILTY VERDICTS WERE SUPPORTED BY SUFFICENT EVIDENCE AND WHETHER THE ACCOMPLICE TESTIMONY WAS CORROBORATED
II. WHETHER THE COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE REQUIREMENT THAT ACCOMPLICE TESTIMONY MUST BE CORROBORATED
III. WHETHER THE 404(B) EVIDENCE WAS IMPROPERLY ADMITTED
IV. WHETHER THE COURT ERRED WHEN IT REFUSED TO ALLOW TWO DIFFERENT STATE'S WITNESSES TO BE IMPEACHED WITH THEIR BURGLARLY CONVICTIONS THAT WERE LESS THAN 10 YEARS OLD
V. WHETHER REVERSAL IS REQUIRED TO CUMULATIVE ERROR
VI. WHETHER THE COURT ERRED BY DENYING THE MOTION FOR NEW TRIAL BASED ON NEW EVIDENCE

(Appellant's brief, p. 6.)

The state rephrases the issues as:

1. Has Capone failed to show that Mr. Stone was an accomplice to murder in the first degree and has Capone failed to show the jury lacked sufficient evidence to convict?

2. Has Capone failed to show the district court committed fundamental error by not instructing the jury regarding the corroboration requirement for accomplice testimony?

3. Did Capone fail to preserve for appeal his challenges to evidence that was admitted at trial without objection; and has Capone otherwise failed to show the district court abused its discretion when it admitted certain evidence over Capone's evidentiary objections?

4. Has Capone failed to show the district court abused its discretion when it excluded evidence of two witnesses' prior felony convictions?

5. Has Capone failed to show error, much less cumulative error?

6. Has Capone failed to show the district court abused its discretion when it denied his motion for a new trial?

ARGUMENT

I.
The Jury Had More Than Sufficient Evidence To Convict Capone Of The Charged Crimes

A. Introduction

Capone argues that the jury did not have sufficient evidence to convict him of any of the charges because Mr. Stone was an accomplice whose testimony was uncorroborated. (See Appellant's brief, pp. 7-19.) Contrary to Capone's assertion on appeal, Mr. Stone was not an accomplice to murder, because his mere presence during the commission of the crime was insufficient to make him an accomplice. Further, even assuming Mr. Stone was an accomplice, the state presented sufficient evidence to corroborate Mr. Stone's testimony and establish, beyond a reasonable doubt, the essential elements of all the charged crimes.

B. Standard Of Review

"Appellate review of the sufficiency of the evidence is limited in scope." State v. Mitchell, 146 Idaho 376, 382, 195 P.3d 737, 741 (Ct. App. 2008). "A judgment of conviction, entered upon a jury verdict, will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt." Id. (citing State v. Horejs, 143 Idaho 260, 263, 141 P.3d 1129, 1132 (Ct. App. 2006); State v. Herrera–Brito, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); State v. Reyes, 121 Idaho 570, 572, 826 P.2d 919, 921 (Ct. App. 1992)).

The appellate court will not substitute its view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. Id. (citations omitted)). Further, the appellate court will consider the evidence in the light most favorable to the prosecution. Id. (citation omitted).

C. Mr. Stone Was Not An Accomplice To First Degree Murder

On appeal, Capone assumes that Mr. Stone was an accomplice to all three felonies. (See Appellant's brief, pp. 7-19.) Based upon this assumption, Capone argues there was insufficient evidence to convict him of all three crimes because, Capone claims, there was no corroboration for the accomplice's testimony as required by Idaho Code § 19-2117. (See id.)

Capone has failed to show that the state was required to present evidence to corroborate Mr. Stone's testimony implicating Capone in the murder charge. A review of the record and the applicable law shows Mr. Stone was not an accomplice to that crime. Idaho Code § 19-2117 states:

> A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

I.C. § 19-2117.

Idaho Criminal Jury Instruction 313 defines an accomplice as someone who promotes or assists in the commission of a crime:

> An accomplice is a person who intends to promote or assist in the commission of a crime and who either directly commits the acts

> constituting the crime or who, before or during its commission, aids, assists, facilitates, promotes, encourages, counsels, solicits, invites, helps or hires another to commit the crime. Mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not in the absence of a duty to act sufficient to make one an accomplice.

ICJI 313 (brackets omitted); see also State v. Mack, 132 Idaho 480, 484, 974 P.2d 1109, 1113 (Ct. App. 1999); I.C. § 19-1430 ("all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission" are principals). "A bystander's mere acquiescence in, or silent consent to, the commission of an offense, however reprehensible the crime may be, is not sufficient to make that person an accomplice." State v. Ruiz, 115 Idaho 12, 17, 764 P.2d 89, 94 (Ct. App. 1988) (citing State v. Brooks, 103 Idaho 892, 655 P.2d 99 (Ct. App. 1982); State v. Adair, 99 Idaho 703, 587 P.2d 1238 (1978)); see also ICJI 313. Being indicted in the same case is also not enough to make someone an accomplice. See State v. Martinez, 125 Idaho 445, 452, 872 P.2d 708, 715 (1994).

Applying the above principles to the facts of this case, it is clear Mr. Stone was not an accomplice to Rachael's murder. Mr. Stone saw Capone strangling Rachael, but did not in any way promote, encourage or assist Capone in killing her. (See 9/9/14 Tr., p. 1778, L. 21 – p. 1782, L. 25.) Mr. Stone was merely a bystander which is insufficient to render him an accomplice. Compare State v. Ruiz, 115 Idaho at 17, 764 P.2d at 94 (Ct. App. 1988) (holding presence during the crime and moving a vehicle fell short of establishing accomplice liability). While Mr. Stone's apparent acquiescence to Rachael's murder is reprehensible, it does not make him an accomplice to murder.

That Mr. Stone assisted with disposing of Rachael's body and failed to report her death also does not make him an accomplice to murder. (See, e.g., 9/9/14 Tr., p. 1821, L. 22 – p. 1829, L. 14, p. 1850, L. 16 – p. 1871, L. 16; Exs. 113, 141.) A person who knows a felony was committed and willfully conceals it from the police can be an accessory. See ICJI 310. It is well established, however, that "[a]n accessory after the fact is not an accomplice." State v. Grimmett, 33 Idaho 203, 193 P. 380, 382-83 (1920); see also State v. McCabe, 101 Idaho 727, 729, 620 P.2d 300, 302 (1980); State v. Murphy, 94 Idaho 849, 851, 499 P.2d 548, 550 (1972). The testimony of an accessory after the fact is not accomplice testimony and does not require corroboration. See McCabe, 101 Idaho at 729, 620 P.2d at 302. Since Mr. Stone was not an accomplice to first degree murder the corroboration requirements of Idaho Code § 19-2117 are not applicable to Capone's conviction for first degree murder.

D. Even If Mr. Stone Was An Accomplice To First Degree Murder, There Was Corroboration By Other Evidence Which Tended To Connect Capone With The Commission Of That Crime

Mr. Stone was not an accomplice to first degree murder. Even if he was an accomplice the state presented corroborating evidence sufficient to satisfy Idaho Code § 19-2117. On appeal, Capone cites to the closing arguments of counsel to argue there was insufficient evidence to convict him. (See Appellant's brief, p. 11.) Capone's argument is primarily a request for the appellate court to reweigh the testimony presented to the jury. (See Appellant's brief, pp. 14-18.) Contrary to Capone's argument on appeal, the jury had sufficient evidence and more than enough corroboration.

Corroborating evidence need not be sufficient to sustain a conviction on its own, nor must the evidence corroborate every detail of the accomplice's testimony. State v. Hill, 140 Idaho 625, 630, 97 P.3d 1014, 1019 (2004) (citing State v. Aragon, 107 Idaho 358, 364, 690 P.2d 293, 299 (1984); State v. Campbell, 114 Idaho 367, 370, 757 P.2d 230, 233 (Ct. App. 1988); Matthews v. State, 136 Idaho 46, 50, 28 P.3d 387, 391 (Ct. App. 2001)). "Corroboration of an accomplice need only connect the accused with the crime, it may be slight, and need only go to one material fact or it may be entirely circumstantial." State v. Jones, 125 Idaho 477, 486, 873 P.2d 122, 131 (1994) (citing Aragon, 107 Idaho at 364, 690 P.2d at 299; State v. Mundell, 66 Idaho 339, 158 P.2d 799 (1945)). Circumstantial evidence is sufficient to corroborate an accomplice's testimony. State v. Mitchell, 146 Idaho 376, 382-383, 195 P.3d 737, 741-742 (Ct. App. 2008).

Statements attributable to the defendant may serve as the necessary corroboration. State v. Stone, 147 Idaho 890, 892, 216 P.3d 648, 650 (Ct. App. 2009) (citing Mitchell, 146 Idaho at 382-383, 195 P.3d at 741-742). "Even a highly plausible innocent explanation of the evidence 'does not strip the evidence of its corroborative character.'" Id. at 893, 216 P.3d at 651 (citing Hill, 140 Idaho at 630, 97 P.3d at 1019).

There was corroborating evidence connecting Capone to the crime, including statements made by Capone. Mr. Voss testified that Capone told him that Rachael had gone away before and then come back, but this time she was not coming back. (9/5/14 Tr., p. 1427, L. 23 – p. 1431, L. 6.) Capone also told

Mr. Voss that he would not be convicted for Rachael's murder because "they" will never find her body. (9/5/14 Tr., p. 1442, L. 14 – p. 1444, L. 4.)

Mr. Glass testified that Capone told him that Rachael "ain't doing nothing but pushing up daisies." (9/5/14 Tr., p. 1455, L. 20 – p. 1456, L. 12.) Capone also told Mr. Glass that Rachael was a "bitch" and "they would never find the body." (9/5/14 Tr., p. 1457, Ls. 2-6.) Mr. Glass also testified that Capone said, "I buried the fuckin' bitch so deep they'll never find her," and told him several different versions about the last time he saw Rachael. (9/5/14 Tr., p. 1460, Ls. 1-8, p. 1466, Ls. 17-25.) Capone also told Mr. Glass that Rachael might turn him in for having guns, and he could go to prison. (9/5/14 Tr., p. 1467, Ls. 1-11.) Capone said that Rachael was a "bitch" and that "he'd end it all before he'd lose everything again." (Id.)

Chelsea Dahl testified that, about a week before Rachael disappeared, Capone was very upset because Rachael missed a marriage counseling session. (9/8/14 Tr., p. 1568, L. 9 – p. 1569, L. 11.) Capone told Ms. Dahl that Rachael did not "know who she fucked with because I can make people disappear." (Id.)

Captain Hally testified that Capone admitted to stalking and harassing Rachael. (9/4/14 Tr., p. 1185, L. 10 – p. 1186, L. 21.) Capone admitted he used Spoof.com to change his voice and hide his phone number. (Id.) When the detectives approached Capone at his shop, shortly after Rachael went missing, Capone became emotional and said something along the lines of "it wasn't supposed to happen like this." (9/4/14 Tr., p. 1236, L. 5 – p. 1238, L. 6.)

Mr. Stone testified that Capone was wearing black gloves while he strangled Rachael. (9/9/14 Tr., p. 1782, L. 12 – p. 1784, L. 1.) Lieutenant Fry found a box of black gloves in Capone's pickup, and a search of the Yukon that Rachael was driving uncovered a piece of a black glove in the passenger seat. (9/4/14 Tr., p. 1203, L. 22 – p. 1205, L. 4, p. 1327, Ls. 16-23, p. 1335, L. 8 – p. 1338, L. 23; Exs. 98-100.) Capone's DNA was a major contributor on the outside glove tip, and Capone's DNA was present at a higher amount than any other DNA. (9/5/14 Tr., p. 1387, L. 18 – p. 1389, L. 15, p. 1389, L. 25 – p. 1390, L. 17.)

Mr. Stone testified that, on the night of the murder, he stayed inside the shop while Capone went outside to speak with Rachael several times. (9/8/14 Tr., p. 1771, L. 21 – p. 1775, L. 11.) Tim Fountain, who lived near Capone's repair shop, testified he saw a woman and a man in a confrontation outside of Capone's shop on April 16, 2010. (9/8/14 Tr., p. 1696, L. 2 – p. 1706, L. 14; Exs. 117-120.) Both Mr. Stone and Mr. Fountain heard a loud noise from Capone's shop that same evening. (9/8/14 Tr., p. 1696, L. 2 – p. 1706, L. 14; 9/9/14 Tr., p. 1778, L. 21 – p. 1782, L. 9.)

After the murder, Capone took up Rachael's purse off the ground and put it in the Yukon. (9/9/14 Tr., p. 1793, L. 20 – p. 1795, L. 7.) When the Yukon was found by the Dyna Mart, Rachael's purse was sitting in plain view in the vehicle and where Rachael would never have left it. (9/2/14 Tr., p. 880, L. 9 – p. 881, L. 2; 9/3/14 Tr., p. 990, Ls. 14-20; Ex. 17.)

Louis Soule testified that he saw Capone on the evening of Friday, April 16, 2010, with the white Yukon that Rachael was previously driving. (9/8/14 Tr., p. 1673, L. 3 – p. 1681, L. 14, p. 1690, L. 3 – p. 1693, L. 18; Ex. 11.) Capone was walking quickly and ignoring Mr. Soule, which was unusual. (Id.)

Cell phone tower data also corroborated Mr. Stone's testimony. Evidence from the cell phone towers used by Rachael's cell phone throughout Friday, April 16, 2010, showed her movements from Capone's shop to the Office Depot in Moscow, to the store where she bought the Groslch beer, and then back to Capone's shop. (9/11/14 Tr., p. 2236, L. 14 – 2250, L. 2; Exs. 140.3 – 140.25.) The last voice phone call from Rachael's phone was at 8:09 p.m. to Dennis Plunkett's cell phone. (9/11/14 Tr., p. 2244, L. 19 – p. 2246, L. 16; Exs. 140.20-140.21.) This call used the Paradise Ridge Tower in Moscow, Idaho. (Id.) The Paradise Ridge Tower is the tower closest to Capone's shop. (Id.) Rachael's phone also received a text message using that same tower at 8:27 p.m. (Id.)

Capone's own cell phone records also corroborated Mr. Stone's testimony. (9/11/14 Tr., p. 2250, L. 3 – p. 2251, L. 6; Exs. 140.26-140.28.) The records show that Capone's cell phone was also using the Paradise Ridge Tower. (Id.) Capone's cell phone logged 29 phone calls between 4:12 p.m. and 7:30 p.m., on April 16, 2010, and during all 29 calls his cell phone used the Paradise Ridge Tower. (Id.) From 9:57 p.m. to 10:50 p.m., Capone's cell phone also used the Paradise Ridge Tower. (Id.)

Further, records show that Mr. Stone's cell phone also used the Paradise Ridge Tower throughout the day and evening of April 16, 2010, including phone

calls at 7:19 p.m. and 8:40 p.m. (9/11/14 Tr., p. 2251, L. 7 – p. 2252, L. 15; Exs. 140.29-140.32.) In addition, the decrease in cell phone activities for Capone, Rachael and Mr. Stone's cell phones corroborated Mr. Stone's testimony. (9/11/14 Tr., p. 2253, L. 9 – p. 2254, L.1; Exs. 140.35-140.36.)

Capone's behavior after the murder also provides circumstantial evidence that supports Mr. Stone's testimony. After Rachael separated from him, Capone stayed with his friend, Mr. Bogden. (9/3/14 Tr., p. 1075, L. 8 – p. 1077, L. 13.) Mr. Bogden's wife, Carole Bogden, testified that Capone was not home by midnight on Friday, April 16, 2010, and she did not see him when she woke up at 8:00 a.m. on Saturday. (9/3/14 Tr., p. 1135, L. 24 – p. 1138, L. 9.) She also testified that when she finally saw Capone on Saturday, he was acting unusual. (Id.)

John Houser, the pastor at Capone's church, testified that on the Sunday following the murder, Capone's actions were "very unusual." (9/3/14 Tr., p. 1150, L. 21 – p. 1153, L. 10.) Capone wore sunglasses in church and he got up and left while Pastor Houser was teaching. (9/3/14 Tr., p. 1151, L. 6 – p. 1153, L. 10.)

Shortly after Rachael disappeared, Mr. Bogden asked Capone if he had anything to do with Rachael's disappearance. (9/3/14 Tr., p. 1110, L. 17, p. 1111, L. 24.) Capone did not answer. (Id.) Mr. Bogden explained that they were driving around for five hours talking and, during that long conversation, Mr. Bogden asked Capone a specific question:

> And so I went to – my advice to him was, well – I asked him specifically, if you have any – do you have anything to do with

> Rachael's disappearance? And he didn't – didn't answer. He said, that's what my family asked. And I said, no way. But he didn't answer me directly.

(9/3/14 Tr., p. 1111, Ls. 8-13.)

Finally, Rachael's family was continually searching for Rachael, but Capone never helped look for her. (9/2/14 Tr., p. 954, Ls. 8-17; 9/3/14 Tr., p. 987, L. 7 – p. 989, L. 3, p. 1114, Ls. 3-21, p. 1139, Ls. 13-18; 9/4/14 Tr., p. 1239, Ls. 7-15.)

While Mr. Stone was not an accomplice to first degree murder, there was evidence corroborating his testimony. The jury had sufficient competent evidence to find Capone guilty of first degree murder.

E. There Was Corroboration Of Mr. Stone's Testimony Which Tended To Connect Capone To Failure To Report Death And Conspiracy To Commit Failure To Report Death Charges

Mr. Stone pled guilty to conspiring to fail to report Rachael's death to the coroner or law enforcement. (See R., pp. 442-445.) Mr. Stone admitted aiding Capone in disposing of Rachael's body and lying to help him cover it up. While Mr. Stone was likely an accomplice to the failure to notify coroner or law enforcement of death, and conspiracy to commit failure to notify coroner or law enforcement of death charges, there was substantial testimony corroborating his testimony regarding these charges.

As noted above, corroboration accomplice testimony need only connect the accused with the crime, it may be slight, and need only go to one material fact or it may be entirely circumstantial." Jones, 125 Idaho at 486, 873 P.2d at 131 (citations omitted). In addition to the evidence and admissions by Capone

noted in section I.D. above, there is additional corroborating evidence connecting Capone to the failure to notify coroner or law enforcement of death and conspiracy to commit failure to notify coroner or law enforcement of death charges

Mr. Stone testified that he and Capone wrapped Rachael's body in a tarp. (9/9/14 Tr., p. 1817, L. 23 – p. 1821, L. 6.) Nathan Donner testified that he used to help Capone at his shop and he testified that the two tarps in the loft of Capone's shop had overspray on them from paint. (9/5/14 Tr., p. 1506, L. 2 – p. 1507, L. 5, p. 1515, L. 11 – p. 1516, L. 11, p. 1531, Ls. 9-22; Ex. 61, 64.) However, after Rachael was murdered, and when the police took pictures of the tarps, one of the tarps was new and did not have paint on it. (9/4/14 Tr., p. 1317, L. 15 – p. 1318, L. 11; Exs. 63-65.)

Brian Spence testified that, in January 2007, Capone opened a charge account with Spence Hardware. (9/8/14 Tr., p. 1631, L. 18 – p. 1633, L. 4.) On the morning of Saturday, April 17, 2010, the day after the murder, Capone purchased a 12 x 20 green brown tarp and then asked to close his account. (9/8/14 Tr., p. 1633, L. 5 – p. 1639, L. 4; Ex. 114.) The tarp Capone purchased looked like the new tarp the police found in Capone's shop. (Id.)

Mr. Glass testified that, during a conversation he had with Capone, Capone said that if he was going to kill someone he would put them in a tarp and cut them so there would be no DNA evidence. (9/5/14 Tr., p. 1457, L. 14 – p. 1458, L. 5.)

Mr. Stone testified that, after the murder, Capone locked the shop and told Mr. Stone to follow him in Capone's truck. (9/9/14 Tr., p. 1797, L. 22 – p. 1801, L. 1; Exs. 21-23, 127A.) Capone drove the Yukon and parked it on the back side of the Dyna Mart. (Id.) Detective Sergeant Aston testified that he reviewed video footage taken from the Dyna Mart on April 16, 2010, and saw a truck similar to Capone's truck drive eastbound on Highway 128 at approximately 9:20 p.m. (9/11/14 Tr., p. 2193, L. 3 – p. 2201, L. 14; Exs. 127A-D.)

Alisa Anderson, Mr. Stone's ex-wife, testified that Mr. Stone came home on the night of Friday, April 16, 2010, between 9:00 and 10:00 p.m., and he was driving Capone's pickup. (9/11/14 Tr., p. 2125, L. 19 – p. 2130, L. 25.) She also testified that he then left and did not come home until around 12:30 a.m. (Id.)

Mr. Stone also testified that he and Capone used the Durango to transport Rachael's body. (See 9/9/14 Tr., p. 1788, L. 20 – p. 1791, L. 19.) The video footage taken from the Dyna Mart showed two vehicles that resembled the Durango driving on the highway at approximately 11:21 p.m. and 11:46 p.m. (9/11/14 Tr., p. 2201, L. 15 – p. 2214, L. 10; Exs. 128-131, 132A-B, 133A-B.)

Mr. Stone testified that Capone drove the Yukon to the Dyna Mart. (9/9/14 Tr., p. 1797, L. 22 – p. 1801, L. 1; Exs. 21-23, 127A.) Deborah Stamper, who worked at the Dyna Mart did not see the Yukon when she went to work at 11:00 p.m. (9/15/14 Tr., p. 2504, L. 13 – p. 2507, L. 16.) However, on April 21, 2010, the Yukon was found parked near the Dyna Mart. (9/2/14 Tr., p. 878, L. 1 – p. 880, L. 5.) The police also found a piece of paper with Rachael's blood on it

on the floorboard of the Yukon tucked underneath the front passenger seat. (9/4/14 Tr., p. 1338, L. 24 – p. 1341, L. 6; Exs. 101, 102A, 102B.)

Detective Mooney testified that the police examined the position of the driver's seat in the Yukon. (Id.) (9/4/14 Tr., p. 1343, L. 6 – p. 1346, L. 4; Exs. 105-108.) Rachael was 5'4" tall. (Id.) Detective Mooney got another 5'4" female to sit in the Yukon's driver's seat and determined that a woman of Rachael's height could not comfortably drive the Yukon with the driver's seat in the position it was found. (Id.) Capone is 5'10" tall. (Id.) The driver's seat was in a much better position for a 5'10" male than it was for the 5'4" female. (Id.)

Mr. Stone also testified that Capone instructed him to get a chain. (9/9/14 Tr., p. 1801, L. 23 – p. 1803, L. 17.) Mr. Stone went to his place of work, the City of Moscow, and got a long chain from a scrap iron pile. (9/9/14 Tr., p. 1806, L. 8 – p. 1816, L. 13; Exs. 121-124, 139.) Capone and Mr. Stone used that chain to help wrap Rachael's body in the tarp. (9/9/14 Tr., p. 1817, L. 23 – p. 1821, L. 6.) Rick Benjamin, a fleet supervisor with the City of Moscow, testified the city has a scrap iron pile where old tire chains are placed, and they do not take inventory of that scrap iron. (9/11/14 Tr., p. 2115, L. 14 – p. 2117, L. 5.)

The day after the murder, Mr. Stone and Capone met at Shari's restaurant. (9/9/14 Tr., p. 1838, L. 9 – p. 1840, L. 2.) During this meal Capone reminded Mr. Stone to keep his mouth shut about Rachael's death. (Id.) The state introduced into evidence a receipt showing that Mr. Stone paid for breakfast at Shari's Restaurant at 11:11 a.m. Saturday, April 17, 2010. (Ex. 150.)

In addition, there was corroborating evidence that neither Capone nor Mr. Stone reported Rachael's death to law enforcement or the coroner. Latah County Coroner Catherine Mabbutt testified that neither Capone nor Mr. Stone reported Rachael's death. (9/11/14 Tr., p. 2285, L. 16 – p. 2286, L. 21.) Neither Capone nor Mr. Stone made any reports to law enforcement that Rachael was dead. (9/8/14 Tr., p. 1619, Ls. 2-10, p. 1655, Ls. 18-22.) Further, Rachael's family was continually searching for Rachael, but Capone never helped look for her. (9/3/14 Tr., p. 1114, Ls. 3-21, p. 1139, Ls. 13-18; 9/4/14 Tr., p. 1239, Ls. 7-15.)

Viewing the evidence in the light most favorable to the state, there is more than the slight and circumstantial evidence necessary to corroborate Mr. Stone's accomplice testimony. Capone has failed to show the jury did not have sufficient evidence to convict him of the charged crimes.

II.
The District Court Did Not Commit Fundamental Error When It Did Not Instruct The Jury Regarding Accomplice Corroboration

A. Introduction

Capone did not request, or object to the lack of, a jury instruction regarding accomplice testimony corroboration at trial. (See Appellant's brief, p. 10.) On appeal, Capone argues the lack of such a jury instruction is fundamental error. (See Appellant's brief, pp. 10-11.) Capone's argument fails all three prongs of the fundamental error test.

First, corroboration of accomplice testimony is a statutory requirement, not a constitutional right. Second, the alleged error was not clear from the record because it is not clear Mr. Stone was an accomplice to first degree murder. Third, even if it was error to not give the instruction, the error was harmless because there was evidence that corroborated Mr. Stone's testimony. Capone has failed to show fundamental error.

B. Standard Of Review

When a party fails to object to the jury instructions the appellate court reviews the instructions for fundamental error. State v. Draper, 151 Idaho 576, 588, 261 P.3d 853, 865 (2011). Fundamental error is an error that "so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process." State v. Lavy, 121 Idaho 842, 844, 828 P.2d 871, 873 (1992). In order to constitute fundamental error the defendant must show that the error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." State v. Perry, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010).

C. Capone Has Failed To Show The District Court Committed Fundamental Error By Not Instructing The Jury Regarding The Statutory Requirement That Accomplice Testimony Be Corroborated

Capone did not object to the lack of a jury instruction regarding accomplice testimony corroboration. (See Appellant's brief, p. 10.) On appeal,

Capone argues the lack of jury instruction amounted to fundamental error. (See Appellant's brief, pp. 7-18.) Capone's argument fails all three prongs of the fundamental error test.

1. Capone Has Failed To Establish The Lack Of An Instruction On Accomplice Corroboration Violated An Unwaived Constitutional Right

The requirement that accomplice testimony be corroborated is not a constitutional right. Rather, the requirement for corroboration of accomplice testimony stems from Idaho Code § 19-2117, a statute. Fundamental error only applies to unwaived constitutional rights; a defendant cannot satisfy the first prong of the fundamental error test by alleging a violation of a statutory right. See State v. Moore, 158 Idaho 943, 947, 354 P.3d 505, 509 (Ct. App. 2015). Unobjected to jury instructions can be subject to fundamental error review if the jury instructions violate due process by failing to require the state to prove every element of the charged offense. State v. Hansen, 148 Idaho 442, 444, 224 P.3d 509, 511 (Ct. App. 2009) (citations omitted).) Here, Capone does not argue, nor could he show, that accomplice corroboration is a necessary element of the crimes for which he was convicted. (See Appellant's brief, pp. 7-18.) Because corroboration of accomplice testimony is a statutory right, not a constitutional right, Capone's unpreserved claim of instructional error fails the first prong of the Perry fundamental error analysis.

2. Capone Has Failed To Establish It Was Clear Error To Not Instruct The Jury Regarding The Requirement For Corroboration Of Accomplice Testimony

Even if Capone had an unwaived constitutional right to a jury instruction based upon a statute, the error is not clear from the record. First, it is not clear from the record that Mr. Stone was an accomplice to murder. (See § I.D., supra) Therefore, there is no clear error regarding the failure to instruct on the accomplice testimony corroboration requirement in relation to the murder charge.

It is also not clear from the record that trial counsel's failure to request, or object to a lack of, a jury instruction on corroboration of accomplice testimony was not a tactical decision. An error plainly exists if the error is clear from the record and there is not any need for additional information, including information as to whether the failure to object was a tactical decision. See Perry, 150 Idaho at 228, 245 P.3d at 980.

It appears that part of Capone's trial strategy was to persuade the jury that Mr. Stone was lying about everything, including that a murder even occurred and that there was a cover up of this murder. Capone's trial counsel spent a great deal of time on cross-examination questioning Mr. Stone's credibility. (9/9/14 Tr., p. 1872, L. 23 – p. 1920, L. 25; 9/10/14 Tr., p. 1925, L. 3 – p. 2093, L 4.) Capone's trial counsel repeatedly questioned Mr. Stone's actions and words after the murder to cast doubt on whether he actually witnessed Capone murder Rachael at all. (See e.g. 9/9/14 Tr., p. 1890, Ls. 8-11; 9/10/14 Tr., p. 1931, Ls. 11-19.)

Under the theory that Mr. Stone was lying about the existence of a murder, there was no crime for which Mr. Stone and Capone would be accomplices. The pattern accomplice corroboration jury instruction either would

have instructed the jury that Mr. Stone was an accomplice as a matter of law, or would have required the jury to determine whether Mr. Stone was an accomplice. See ICJI 313. If the district court had instructed the jury that Mr. Stone and Capone were accomplices, or that they could be accomplices, such could have undermined the defense's strategy because the instruction carries an underlying assumption that there was a crime committed for which Mr. Stone could be an accomplice. If Capone committed no crime, as was the defense's theory, there was no need for the accomplice corroboration jury instruction.

Further, the accomplice corroboration jury instruction would not have provided much benefit to Capone. The pattern instruction states that the corroborating evidence need only be "slight" and need only "tend[] to connect the defendant with the commission of the crime." See ICJI 313. As noted above, there was more than enough corroborating evidence presented to the jury. If the district court had given this jury instruction it could have undermined part of the defense's strategy and would have provided minimal benefit to Capone's defense. Based upon this record, the decision to not request an accomplice corroboration jury instruction may have been a tactical decision, and, as such, the alleged error is not clear error and Capone fails the second prong of the fundamental error analysis.

3. Capone Has Failed To Establish Any Error Was Not Harmless

Even if it was error to not instruct the jury regarding the requirement that accomplice testimony be corroborated, the error was harmless. An error in failing to give the jury an instruction regarding accomplice testimony may be

harmless if ample corroborative evidence was presented. State v. Hill, 140 Idaho 625, 630, 97 P.3d 1014, 1019 (Ct. App. 2004) (citing State v. Scroggins, 110 Idaho 380, 385–86, 716 P.2d 1152, 1157–58 (1985)). The corroborating evidence need only tend to connect the defendant to the crime and is sufficient even if it does not corroborate the accomplice's version of the facts. See Scroggins, 110 Idaho at 385–86, 716 P.2d at 1157–58 ("Hence, although [defendant's] testimony did not corroborate [accomplice's] *version* of the facts, it was sufficient to permit a finding that Scroggins was connected with the commission of the offense.").

Here, there was substantial corroborating evidence regarding first degree murder (see § I.D., supra) and both the failure to notify coroner or law enforcement of death, and conspiracy to commit failure to notify coroner or law enforcement of death (see § I.E. supra). Capone cannot show there was any violation of an unwaived constitutional right, nor can he show that any error was clear from the record, and not harmless.

III.
Capone Failed To Object To Most Of The Purported I.R.E. 404(b) Evidence And The District Court Did Not Err In Overruling The Objections Capone Did Make

A. Introduction

The state filed a notice of intent to use I.R.E. 404(b) evidence. (R., pp. 456-458.) Capone filed a motion in limine to exclude the proposed I.R.E. 404(b) evidence. (R., pp. 509-512.) The district court deferred ruling on the I.R.E. 404(b) issues until trial. (R., p. 1556.) However, at trial, Capone objected to only some of the evidence he had previously moved to exclude. (See 9/3/14 Tr., p.

1002, L. 1 – p. 1006, L. 16, p. 1082, L. 7 – p. 1085, L. 4; 9/4/14 Tr., p. 1432, L. 21 – p. 1433, L. 7). The district court overruled those objections. (See id.)

On appeal, Capone argues that all of the purported I.R.E. 404(b) evidence he moved to exclude in his motion in limine should not have been admitted. (See Appellant's brief, pp. 19-29.) Since the district court deferred ruling on the motion in limine until trial, Capone was required to make contemporaneous objections during trial to preserve the issues. Because Capone failed to object to the admission of much of the I.R.E. 404(b) evidence at trial, his challenge to the admission of that evidence is not properly before this Court. As to the evidentiary issues he did preserve by way of specific objection before the trial court, Capone has failed to show error.

B. Standard Of Review

When determining the admissibility of evidence to which an I.R.E. 404(b) objection has been made, the trial court must first determine whether there is sufficient evidence of the other acts that a reasonable jury could believe the conduct actually occurred. I.R.E. 404(b). If so, then the court must consider: (1) whether the other acts are relevant to a material and disputed issue concerning the crime charged, other than propensity; and (2) whether the probative value is substantially outweighed by the danger of unfair prejudice. See State v. Grist, 147 Idaho 49, 52, 205 P.3d 1185, 1188 (2008).

C. Capone Only Preserved For Appeal The Admissibility Of I.R.E. 404(b) Evidence To Which He Specifically Objected At Trial

On appeal, Capone argues that I.R.E. 404(b) evidence was improperly admitted. (See Appellant's brief, pp. 27-29.) Capone's argument on appeal assumes that the admissibility of all of this I.R.E. 404(b) evidence was objected to and therefore preserved for appeal. (See id.) This is incorrect.

Prior to trial the state filed a notice of intent to introduce I.R.E. 404(b) evidence. (R., pp. 456-457.) Capone filed a motion in limine to exclude the proposed I.R.E. 404(b) evidence, and the district court held a hearing on the defense's motion in limine. (R., pp. 509-512, 1553-1556.) The district court deferred ruling on Capone's motion. (R., p. 1556.)

On appeal, Capone claims that at the April 9, 2014 hearing, the district court granted part of his motion in limine to exclude I.R.E. 404(b) evidence and precluded the state from presenting evidence of Capone's May 6, 2010 arrest on gun charges. (See Appellant's brief, pp. 22-23.) This claim is based on a misreading of the record. The district court's comments at the April 9, 2014 hearing, on which Capone's appellate argument rely, reference a different motion to suppress statements Capone made during his May 6, 2010 arrest. (See Appellant's brief, pp. 22-23; 4/9/14 Tr., p. 94, L. 4 – p. 95, L. 1; R., pp. 513-592.) At the April 9, 2014 hearing, the district court suppressed statements made by Capone on May 6, 2010. (4/9/14 Tr., p. 94, Ls. 4-16.) The district court then determined that it would take the other motions in limine under advisement. (4/9/14 Tr., p. 94, L. 17 – p. 95, L. 1.)

> Now, to go back to the motion in limine with respect to the 404(b) evidence, some of that is going to have to be decided at trial. Obviously, the testimony around the Defendant's arrest on May 6th will not be admitted based upon the Court's prior ruling on the statements.
>
> As far as what the cellmates had to say, we'll have to look at that at trial. I'm going to think about the other issues on the motion in limine before deciding.

(Id.)

Contrary to Capone's argument on appeal, this was not a ruling on Capone's motion to exclude I.R.E. 404(b) evidence of his May 6, 2010 arrest. (See Appellant's brief, p. 23.) Read in context, the district court was stating that it's prior ruling suppressing the statements made by Capone on May 6, 2010 would still apply regardless of any I.R.E. 404(b) ruling. The district court was not making a ruling under I.R.E. 404(b) excluding the fact of the May 6, 2010 arrest. This conclusion is supported by the district court's subsequent written order and the court minutes of the April 9, 2014 hearing. After the hearing, the district court issued a ruling on the pre-trial motions (R., pp. 1571-1574.) The written order included a written ruling suppressing Capone's May 6, 2010 statements to police. (R., p. 1573.) The district court's written order did not include any rulings on the motion to exclude the proposed I.R.E. 404(b) evidence. (See R., pp. 1571-1574.) The Court minutes for the April 9, 2014 hearing, which were approved by the district court, reported, "Court stated that the motions in limine in regard to the 404(b) evidence will have to be dealt with at trial." (See R., p. 1556.) Therefore, contrary to Capone's argument on appeal, the district court deferred ruling on Capone's motion in limine to exclude all of the I.R.E. 404(b)

evidence until trial. Because the district court reserved ruling on the motion in limine until trial, it remained incumbent on Capone to object to the evidence when it was offered at trial. Where a district court defers ruling on a motion in limine, the moving party must continue to assert any objections to the evidence as it is offered. See State v. Hester, 114 Idaho 688, 699–700, 760 P.2d 27, 38–39 (1988).

"Absent a prior judicial determination on admissibility, a proper and timely objection must be made in the court below before an issue is preserved for appeal." State v. Baer, 132 Idaho 416, 418-419, 973 P.2d 768, 770-771 (Ct. App. 1999) (citations omitted). Since the district court did not make a prior judicial determination on Capone's motion to exclude the state's proposed I.R.E. 404(b) evidence, Capone was required to make proper and timely objections to preserve these evidentiary issues for appeal.[2] Where Capone failed to do so, the evidentiary issue was not preserved for appeal. This Court must therefore decline to address Capone's challenges to the admissibility of any I.R.E. 404(b) evidence to which he did not object at trial.

[2] The fundamental error analysis does not apply to the unobjected to testimony because fundamental error only applies to unwaived constitutional claims, not evidentiary issues. See State v. Norton, 151 Idaho 176, 182, 254 P.3d 77, 83 (Ct. App. 2011).

D. Capone Has Failed To Show The Trial Court Erred In Admitting The Evidence To Which He Objected At Trial

On appeal Capone addresses three instances where he made a contemporaneous objection at trial. For the reasons set forth below, Capone has failed to show that the district court erred in admitting this evidence.

1. The District Court Did Not Err In Permitting Mr. Bogden To Testify Regarding The Fact It Was Illegal For Capone To Possess A Firearm

During the pre-trial hearing, the state explained the fact that Capone had a prior felony conviction was admissible under I.R.E. 404(b) because it established part of Capone's motive to murder Rachael. (4/9/14 Tr., p. 55, L. 13 – p. 59, L. 1.) As a convicted felon, it was illegal for Capone to possess a firearm. (Id.) However, Capone was in possession of a firearm and he was afraid Rachael would turn him in for possessing the firearm. (Id.)

At trial, during Mr. Bogden's testimony, and outside the presence of the jury, Capone argued his prior felony conviction was not relevant and not admissible under I.R.E. 404(b). (9/3/14 Tr., p. 1082, L. 7 – p. 1085, L. 4.) The state responded by explaining that Mr. Bogden was going to testify that Capone could not have guns because of his prior felony conviction and Capone was concerned about Rachael reporting him for having a gun. (9/3/14 Tr., p. 1083, Ls. 5-22.)

The district court ruled that Capone's prior felony conviction was relevant evidence of his motive to kill Rachael, but the district court instructed Mr. Bogden not to testify about the potential penalty for being a felon in possession of a firearm. (9/3/14 Tr., p. 1083, L. 23 – p. 1084, L. 21.) Mr. Bogden then testified

that Capone wanted to get rid of his gun because he could not legally possess it, and Rachael knew Capone could not legally own a gun. (9/3/14 Tr., p. 1108, L. 6 – p. 1109, L. 8.)

On appeal Capone argues that his concern about Rachael turning him in for illegally possessing a firearm did not provide a motive for murder and there was insufficient evidence to support the state's motive theory. (See Appellant's brief, pp. 27-28.)[3] Capone claims the only evidence to support this motive came from Mr. Glass who testified that Capone said "he'd end it all before he'd lose everything again." (See Id. (citing 9/5/14 Tr., p. 1467, Ls. 10-11).) Capone argues this statement shows Capone would kill himself and not Rachael if he were turned in for illegally possessing the firearm. (See id.) Capone's argument is misplaced.

Under I.R.E. 404(b), evidence of prior wrongs or acts may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or

[3] Capone includes a statement in the 404(b) section of his brief regarding Mr. Bogden's state of mind testimony that he classifies as "strictly speaking not an [sic] 404(b) issue and rather another example of the court admitting irrelevant evidence[.]" (See Appellant's brief, pp. 25-26.) This "example" should not be considered on appeal because Capone failed to identify the admissibility of Mr. Bodgen's state of mind testimony as an issue on appeal, and he has failed to provide argument or law to show how the district court erred in admitting this evidence. See Murray v. State, 156 Idaho 159, 168, 321 P.3d 709, 718 (2014) (quoting State v. Zichko, 129 Idaho 259, 263, 923 P.3d 966, 970 (1996)) (noting an issue will not be considered if "either authority or argument is lacking" and declining to consider appellant's claim because he failed to "provide[] a single authority or legal proposition to support his argument"). Even if it is considered on appeal, Mr. Bodgen's testimony was relevant because, as Capone's longtime friend, his testimony describing Capone's strange behavior leading up to and after the murder and how that behavior was strange enough to affect Mr. Bogden's state of mind and behavior refutes Capone's theory and supports the state's theory of the case.

absence of mistake or accident. I.R.E. 404(b); State v. Phillips, 123 Idaho 178, 845 P.2d 1211 (1993). The first tier, of the two-tiered analysis, involves a "two-part inquiry: (1) whether there is sufficient evidence to establish the prior bad acts as fact; and (2) whether the prior bad acts are relevant to a material disputed issue concerning the crime charged, other than propensity." State v. Naranjo, 152 Idaho 134, 138, 267 P.3d 721, 725 (Ct. App. 2011). (citing Grist, 147 Idaho at 52, 205 P.3d at 1188).

Here, the prior bad act was Capone's prior felony conviction. (See R., pp. 456-457.) The prior bad act was admitted to prove motive. Using the two-tiered Grist analysis, the first part of the first tier required the district to determine whether there was sufficient evidence to establish that Capone was previously convicted of a felony. This fact was undisputed. However, on appeal Capone flips the Grist analysis on its head. Capone appears to argue that the district court was required to determine whether there was sufficient evidence of the motive before the prior bad act could be admitted. Under I.R.E. 404(b) it is the prior bad act that is used to prove motive – not the other way around.

Even if Capone's formulation of the Grist analysis is accepted – Mr. Glass' testimony, contrary to Capone's argument, actually supported the state's theory of motive for the murder. In context of Capone's conversation with Mr. Glass, Capone's statement, "end it all," was directed towards Rachael, "the bitch," and not himself. (See 9/5/14 Tr., p. 1467, Ls. 1-11.)

> Q. Okay. Did he – did you two ever have a discussion about his concern regarding being turned in for guns?

A. Yes. He got worried that she might turn him in for guns because he was a convicted felon and he'd go to prison.

Q. Did he make a comment to you regarding Rachael after he said that?

A. Yeah. You know, she's a bitch, and he would never – he'd end it all before he'd lose everything again.

(Id.)

Capone has failed to show the district court erred when it overruled his objection to Mr. Bogden's testimony and permitted evidence of his prior felony conviction to show motive to murder Rachael.

Even if it was error to admit evidence of Capone's prior felony conviction through Mr. Bogden, the error was harmless because the same evidence was admitted through other witnesses without objection. "Where a defendant alleges error at trial that he contemporaneously objected to, this Court reviews the error on appeal under the harmless error test." State v. Almaraz, 154 Idaho 584, 600-01, 301 P.3d 242, 258-259 (2013) (citation omitted). "[T]he error is harmless if the Court finds that the result would be the same without the error." Id. at 598, 301 P.3d at 256 (citation omitted). Mr. Glass' testimony regarding Capone's prior felony conviction came in without objection. (See 9/5/14 Tr., p. 1467, Ls. 1-11.) Nor did Capone object to the testimony of Mr. Donner, who testified that Capone asked him to take a rifle because Capone was worried that Rachael or someone would turn him in for possessing it. (9/5/14 Tr., p. 1514, L. 18 – p. 1515, L. 6.) Because Mr. Bodgen's testimony that Capone had a prior felony conviction was merely cumulative of other evidence admitted without objection,

there is no reasonable possibility the alleged error contributed to Capone's conviction.

2. The District Court Did Not Err In Overruling Capone's Relevance Objection To A Portion Of Mr. Voss' Testimony

Prior to trial, the state gave notice that it intended to offer evidence of Capone's May 6, 2010 arrest on a federal gun charge, and the fact that Capone was incarcerated in various correctional facilities subsequent to his May 6, 2010 arrest, because such evidence provided the foundation and context for both the statements Capone made to Detective Hally and for the multiple admissions Capone made to his cellmates. (R., pp. 456-457; 4/9/14 Tr., p. 59, L. 2 – p. 61, L. 23.) At the April 9, 2014 hearing on his motion in limine to exclude the evidence, Capone objected to introducing the reasons for his incarceration. (See 4/9/14 Tr., p. 60, Ls. 14-21.) Like the other issues, the district court did not rule on Capone's motion in limine to exclude this evidence at the April 9, 2014 hearing and instead reserved the ruling for trial.

On appeal, Capone points to three instances in which the fact Capone was arrested for a gun charge came up. (see Appellant's brief, pp. 23-24 (citing 9/4/14 Tr., p. 1255, Ls. 16-18; 9/5/14 Tr., p. 1432, L. 21 – p. 1433, L.3;[4] 9/9/14 Tr., p. 1655, Ls. 5-7.) However, Capone did not object to either the first or third reference, (See 9/4/14 Tr., p. 1255, Ls. 14-20; 9/9/14 Tr., p. 1655, Ls. 5-12),

[4] The quote on page 24 of Appellant's brief cites to "Tr. 1433, ln. 21—p. 1433, ln. 3." This appears to be a typo and the correct citation to the quote is "9/5/14 Tr., p. 1432, L. 21 – p. 1433."

and, as such, Capone's challenges to that evidence are not properly before this Court on appeal. See Hester, 114 Idaho at 699-700, 760 P.2d at 38-39.

Capone did raise a "relevance" objection to the second cited reference to his arrest on gun charges, which reference occurred during the questioning of Mr. Voss, one of Capone's cellmates. (See 9/5/14 Tr., p. 1432, L. 21 – p. 1433, L. 3.) Mr. Voss first testified, without objection, that Capone told him he was in jail because of a "gun charge." (9/5/14 Tr., p. 1427, L. 23 – p. 1428, L. 24.) It appears that this conversation between them led to a discussion about whether Capone killed his wife. (Id.) Capone told Mr. Voss that Rachael "wasn't coming back." (Id.) Later during Mr. Voss' testimony, Capone raised a relevance objection when Mr. Voss mentioned that Capone was in custody because he possessed a .22 Glock pistol. (9/4/14 Tr., p. 1432, L. 21 – p. 1433, L. 8.)[5] The district court correctly overruled the objection. As noted above, Capone's legal problems regarding guns formed part of his motive to murder Rachael, and thus evidence of those legal problems was admitted for a proper purpose under Rule 404(b). Further, the fact that Capone was incarcerated was relevant to a materially disputed issue. At trial, Capone disputed that he murdered Rachael, and his admissions to his cellmates regarding Rachael being dead and to

[5] On appeal, Capone accuses the state of "reneging on its statement" regarding having Capone's cellmates testify regarding the reason for Capone's incarceration. (See Appellant's brief, p. 24.) This accusation should not be considered on appeal because Capone failed to provide argument or law to show any error. See Murray, 156 Idaho at 168, 321 P.3d at 718; Zichko, 129 Idaho at 263, 923 P.3d at 970. It is not even clear if this is some appellate claim. Further, even if it is considered, Capone's accusation does not consider the context of the discussion between the parties at the April 9, 2014 hearing. (4/9/14 Tr., p. 60, L. 22 – p. 61, L. 23.)

burying Rachael were relevant to that disputed issue. The district court properly overruled Capone's relevance objection.

In addition to arguing the evidence was not relevant for any proper purpose, Capone also argues the court failed to weigh the probative value against its potential for unfair prejudice pursuant to I.R.E. 403. (See Appellant's brief, pp. 28-29.) Capone, however, did not raise an I.R.E. 403 challenge to the evidence at trial, instead asserting only that the evidence was not relevant. (See (9/4/14 Tr., p. 1432, L. 21 – p. 1433, L. 8.) Therefore this claim is not preserved for appeal.

Even if it was error to admit this statement from Mr. Voss regarding the gun charge, the error was harmless. Evidence regarding Capone's incarceration on gun charges was admitted at least twice without objection. (See, e.g., 9/4/14 Tr., p. 1255, Ls. 14-20; 9/9/14 Tr., p. 1655, Ls. 5-12). Therefore, even if the district court erred in admitting Mr. Voss' testimony about Capone's incarceration on a gun charge, it was harmless because the same testimony came in several times without objection.

3. The District Court Properly Overruled Capone's Objections To Ms. Norberg's Testimony Regarding Capone's Prior Act Of Violence Against Rachael

Prior to trial the state filed a notice of intent to introduce I.R.E. 404(b) evidence regarding Capone's stalking, harassment and attempted strangulation of Rachael. (R., pp. 456-457.) The state argued this evidence went directly to motive and to the course of conduct that led up to Capone killing Rachael. (4/9/14 Tr., p. 61, L. 24 – p. 64, L. 1.) It was this course of conduct that

ultimately led to Rachael going to Capone's shop on April 16, 2010, in part, to give him her final answer about whether she was going through with the divorce.

During its direct examination of Ms. Norberg, one of Rachael's friends, the state asked about a physical altercation between Capone and Rachael and what Capone said about it. (9/3/14 Tr., p. 1002, L. 1 – p. 1006, L. 16.) Capone objected claiming this was a prior bad act and prohibited under I.R.E. 404(b). (Id.) The state argued that there had already been testimony regarding this particular physical altercation and that presentation of the evidence was necessary to lay the foundation for the admissibility of Rachael's statements pursuant to the state of mind exception to the hearsay rule, and also to lay foundation to admit statements made by Capone. (Id.)

The state then elicited testimony regarding how scared and frightened Rachael was after this physical altercation and then asked Ms. Norberg what Rachael said. (9/3/14 Tr., p. 1002, L. 14 – p. 1005, L. 19.) Capone objected on hearsay grounds, the district court overruled the objection, but the state rephrased the question anyway. (Id.) The state then asked Ms. Norberg what Capone told her about the incident. (Id.) Ms. Norberg testified that Capone told her the physical altercation was just an accident. (Id.)

The district court correctly overruled Capone's objection to Ms. Norberg's testimony. Evidence of the prior physical altercation between Capone and Rachael was relevant both for motive and to provide context to the admissions made by Capone regarding Rachael not coming back to testify against him in the criminal case that arose out of this physical altercation. The physical altercation

between Capone and Rachael was what caused their separation and provided part of Capone's motive to murder Rachael. Without the separation, Rachael would not have been at Capone's shop on April 16, 2010, in part, to deliver the ultimate decision whether they should divorce.

Even if it was error for the district court to overrule Capone's objections to Ms. Norberg's testimony, the error was harmless because the same evidence came in without objection through other witnesses. Prior to Ms. Norberg's testimony, Dennis Plunkett testified about the same physical altercation between Capone and Rachael and testified that Capone admitted it, but blamed the physical altercation on rum. (9/2/14 Tr., p. 908, L. 15 – p. 909, L. 9.) There was no objection to this testimony. (See id.) Nor does Capone cite to Mr. Plunkett's testimony on appeal. (See Appellant's brief, pp. 20-29.)

Further, there were several other instances in which testimony regarding a physical altercation and Capone's stalking behavior was admitted without objection at trial. Captain Hally testified that Capone told him that he had been stalking and harassing Rachael. (9/4/14 Tr., p. 1185, L. 10 – p. 1186, L. 21.) Captain Hally also testified that Capone told him about the physical altercation with Rachael. (9/4/14 Tr., p. 1187, L. 9 – p. 1188, L. 14.) Capone did not object to this testimony at trial (9/4/14 Tr., p. 1185, L. 10 – p. 1188, L. 14), nor has he cited it on appeal (see Appellant's brief, 20-29).

Mr. Glass also testified without objection that Capone told him that the strangulation case in Asotin County was no big deal because he barely choked Rachael and it was all a misunderstanding. (9/5/14 Tr., p. 1455, L. 2-19.)

Capone said he was not trying to kill Rachael. (Id.) It was in the context of this conversation about the strangulation case that Capone made the incriminating admission that Rachael was not going to show up to testify against him because she was "pushing up daises."

> Q. Okay. Did [Capone] talk about whether the prosecutor had a case?
>
> A. Yeah. Then he starts talking about the case that he's dealing with up here in Moscow; that if they can't find the body, there's no murder. There's no case. No body, no – no case.
>
> Q. Did you talk to him about what if Rachael shows up and testifies against him?
>
> A. I asked him – I said, you'd be fucked if Rachael showed up and testified against you. And he says, she ain't doing nothing but pushing up daises.
>
> Q. And how did you react to that?
>
> A. It was pretty chilling for him to say that.

(9/5/14 Tr., p. 1455, L. 20 – p. 1456, L. 7.) Capone did not object to any of this testimony. (See 9/5/14 Tr., p. 1454, L. 17 – p. 1456, L. 12.)

The district court did not err when it overruled Capone's objection regarding Ms. Norberg's testimony about a prior physical altercation between Capone and Rachael. Even if it was error, it was harmless, because, as noted above, this same evidence was admitted from other witnesses without objection.

IV.
The District Court Did Not Err By Granting The State's Motion To Exclude Evidence Of Certain Witnesses' Prior Criminal Convictions Under I.R.E. 609

A. Introduction

The district court granted the state's motion to exclude evidence of Mr. Voss' and Mr. Glass' prior convictions. The district court found their prior convictions were not relevant to credibility under I.R.E. 609. (R., p. 1571.) On appeal, Capone argues the district "court erred by refusing to allow the witnesses to be impeached by non-remote burglary convictions." (Appellant's brief, pp. 30-34 (underlining omitted).) Capone's argument on appeal fails. While evidence of a burglary conviction can sometimes be used to impeach a witness' credibility under Rule 609, the admissibility of such conviction is determined on a case-by-case basis and Capone has failed to show that the district court erred in deciding, in this case, that Mr. Voss' and Mr. Glass' convictions were not relevant to credibility. Even if there was error, it was harmless.

B. Standard Of Review

Under Idaho Rule of Evidence 609(a) the trial court must apply a two-prong test to determine whether evidence of the prior conviction should be admitted: (1) the trial court must determine whether the fact or nature of the conviction is relevant to the witness' credibility; and (2) if so, the trial court determines whether the probative value of the evidence outweighs its prejudicial effect. State v. Thompson, 132 Idaho 628, 630, 977 P.2d 890, 892 (1999) (citation omitted). When the appellate court reviews the trial court's decision as to the first prong, concerning relevance, the standard of review is *de novo.* Id.

(citation omitted)). The appellate court reviews the trial court's decision as to the second prong, concerning whether the probative value of the evidence outweighs its prejudicial effect, for an abuse of discretion. Id. (citation omitted).

C. The District Court Did Not Abuse Its Discretion When It Excluded Evidence Of Two Witnesses' Prior Burglary Convictions

Prior to trial the state moved to exclude evidence of Mr. Voss' and Mr. Glass' prior criminal history. (R., pp. 485-486.) At the hearing on the pre-trial motions, Capone argued that Mr. Voss' 2010 burglary conviction was a crime of moral turpitude and was relevant to his credibility. (See 4/9/14 Tr., p. 6, L. 4 – p. 7, L. 14.) Capone also objected to excluding Mr. Glass' 2006 burglary conviction. (Id.) The district court granted the state's motion, ruling that the prior convictions were not relevant to credibility. (R., p. 1571.)

On appeal, Capone argues the district court erred when it granted the state's motion in limine to exclude evidence of Mr. Voss' and Mr. Glass' criminal history, contending it is unclear how the district court reached its decision that the prior convictions were not relevant to Mr. Voss' and Mr. Glass' credibility. (See Appellant's brief, pp. 30-34.) The district court did not err.

Idaho Rule of Evidence 609(a) allows the use of both the fact and nature of a witness's prior felony conviction for impeachment only if the court determines they are relevant to the witness's credibility and only if the probative value of the evidence outweighs its prejudicial effect. See I.R.E. 609(a). Under the first prong of the Rule 609 test, the prior convictions were not relevant to credibility. (R., p. 1571.) The Idaho courts have noted that the question of the

relevancy of prior felonies for the purpose of attacking a witness's credibility is a thorny one. State v. Grist, 152 Idaho 786, 789, 275 P.3d 12, 15 (Ct. App. 2012) (citing State v. Allen, 113 Idaho 676, 678, 747 P.2d 85, 87 (Ct. App. 1987)). "The 'varied relationships between felony convictions and witness credibility have produced much disagreement among courts and commentators about the particular crimes suitable for impeachment.'" Id. (quoting State v. Pierce, 107 Idaho 96, 103, 685 P.2d 837, 844 (Ct. App. 1984)).

Idaho courts have divided felonies into three categories having varying degrees of probative value on the issue of credibility. Id.

> Crimes in the first category, such as perjury, are intimately connected to a person's veracity and credibility, while crimes in the second category, like robbery and burglary, are somewhat less relevant to credibility because they do not deal directly with veracity and have only a general relationship with honesty. Offenses in the third category, which include crimes of passion and acts of violence that are the product of emotional impulse, have been said to have little or no direct bearing on honesty and veracity.

Id. (internal citations omitted). Rule 609 requires a case-by-case analysis to determine whether a particular felony is relevant to credibility. See id. What kind of theft crime was committed informs the analysis. See id. ("For example, while theft crimes generally do not involve dishonest or false statements, such crimes may be committed by fraudulent or deceitful means and fall into the first category.")

As the Idaho Court of Appeals noted in Grist, burglary is "somewhat less relevant to credibility because [it does] not deal directly with veracity and [has] only a general relationship with honesty." Grist, 152 Idaho at 789, 275 P.3d at

15. Therefore, a burglary conviction is not automatically relevant to credibility.[6] Capone does not cite to anything other than the general proposition that burglary "can" be relevant to credibility, and does not cite to any evidence showing that either Mr. Voss' 2010 burglary conviction or Mr. Glass' 2006 burglary conviction resulted from fraudulent or deceitful behavior such that the convictions would be relevant to credibility and admissible under I.R.E. 609. Having failed to point to any evidence in the record demonstrating the burglary convictions were actually relevant to credibility, Capone has failed to show the district court erred in excluding evidence of the prior convictions.

D. Even If The District Court Erred In Granting The State's Motion In Limine, The Error Was Harmless

The district court did not err when it determined that Mr. Voss' 2010 burglary conviction and Mr. Glass' 2006 burglary conviction were not relevant to their credibility at trial. However, even if the district court erred, the error was harmless. "Where a defendant alleges error at trial that he contemporaneously objected to, this Court reviews the error on appeal under the harmless error test." State v. Almaraz, 154 Idaho 584, 600-01, 301 P.3d 242, 258-259 (2013) (citation omitted). "[T]he error is harmless if the Court finds that the result would be the same without the error." Id. at 598, 301 P.3d at 256 (citation omitted).

[6] A person can be guilty of burglary if they enter a building with the intent to commit "any felony." See I.C. § 18-1401. Thus, someone can be guilty of a burglary if they enter a building to commit a violent felony, which would have very little to do with that person's veracity.

Capone was able to challenge Mr. Voss' and Mr. Glass' credibility on a variety of issues. (See e.g. 9/5/14 Tr., p. 1439, L. 23 – p. 1445, L. 8, p. 1470, L. 3 – p. 1480, L. 7, p. 1489, L. 1 – p. 1490, L. 5, p. 1493, L. 3 – p. 1497, L. 14, p. 1501, Ls. 3-19; Ex. R.) Because reference to their prior convictions would not have changed the result of the trial, any error was harmless.

V.
Capone's Cumulative Error Claim Fails Because He Has Failed To Show Error, Much Less Multiple Errors To Cumulate

Capone argues the doctrine of cumulative error requires reversal of his convictions. (See Appellant's brief, pp. 34-35.) Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. "However, a necessary predicate to the application of the doctrine is a finding of more than one error." State v. Parker, 157 Idaho 132, 149, 334 P.3d 806, 823 (2014) (quoting State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2008)). Because Capone has failed to show any error, there is no error to cumulate in this case. Alternatively, even if errors in the trial had been shown, they would not amount to a denial of due process that would require reversal. State v. Gray, 129 Idaho 784, 804, 932 P.2d 907, 927 (Ct. App. 1997); State v. Barcella, 135 Idaho 191, 204, 16 P.3d 288, 301 (Ct. App. 2000) (accumulation of errors deemed harmless). Capone has failed to show any cumulative error.

VI.
Capone Has Failed To Show The District Court Abused Its Discretion When It Denied His Motion For A New Trial

A. Introduction

Capone filed a Motion for a New Trial, arguing that Mr. Glass' purported statement to a Mr. Beyer in July 2013 constituted new evidence. (See Aug. R., pp. 1-7.) The district court denied Capone's motion, finding that the statement was not material and would have only been used for impeachment. (Aug. R., pp. 29-35.) Further, the district court found that the statement would not have provided sufficient evidence to change the jury verdict, because there was substantial evidence of Capone's guilt. (Id.) Capone has failed to show the district court abused its discretion.

B. Standard Of Review

Granting or denying a motion for a new trial is within the district court's discretion and will not be disturbed on appeal unless that discretion is abused. State v. Jones, 127 Idaho 478, 481, 903 P.2d 67, 70 (1995).

C. The District Court Did Not Abuse Its Discretion When It Denied Capone's Motion For A New Trial

After Capone was convicted and sentenced, he filed a motion for a new trial based on newly discovered evidence. (See Aug. R., pp. 1-7.) The new evidence consisted of the following: On March 9, 2015, Deputy Demyer reported that he obtained a statement from a Tyler Beyer who was being booked into jail with a BAC of .20. (Id.) Mr. Beyer claimed that in July 2013, Mr. Stone told him that they would never find Rachael's body in the river because it was not there.

(Id.) The district court found that the statement purportedly made by Mr. Stone to Mr. Beyer was not material and would have been admissible only for impeachment. (Aug. R., pp. 29-35.) Further, the district court found that the statement would not have provided sufficient evidence to change the jury verdict. (Id.)

On appeal, Capone argues the district court abused its discretion. (See Appellant's brief, pp. 37-38.) Capone is incorrect. A defendant may obtain a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at the trial." I.C. § 19-2406(7). In State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976), the Idaho Supreme Court articulated the four-part test a defendant must satisfy in order to be entitled to a new trial based upon newly discovered evidence. That test requires a defendant to show that the evidence offered in support of his motion for a new trial (1) is newly discovered and was unknown to the defendant at the time of trial; (2) is material, not merely cumulative or impeaching; (3) will probably produce an acquittal; and (4) failure to learn of the evidence was due to no lack of diligence on the part of the defendant. Id. at 691, 551 P.2d at 978. In announcing this four-part test, the Court recognized that, "after a man has had his day in court, and has been fairly tried, there is a proper reluctance to give him a second trial." Drapeau, 97 Idaho at 691, 551 P.2d at 978 (citation omitted). "Motions for a new trial based on newly discovered evidence are disfavored and should be granted with caution, reflecting the importance accorded to considerations of repose, regularity of decision making,

and conservation of scarce judicial resources." State v. Stevens, 146 Idaho 139, 144, 191 P.3d 217, 222 (2008) (quotations and citations omitted). Application of the Drapeau test to the facts of this case supports the district court's denial of Capone's motion for new trial.

1. Capone Has Failed To Show The District Court Abused Its Discretion When It Found The Evidence Was Not Material

Even assuming the evidence was newly discovered, the second prong of the Drapeau standard requires a defendant seeking a new trial on the grounds of newly discovered evidence to show that the proposed evidence is material to his guilt or innocence, and is not merely impeaching. Drapeau, 97 Idaho at 691, 551 P.2d at 978. The Idaho Court of Appeals has described the difference between impeachment evidence and substantive evidence as follows:

> Unlike substantive evidence which is offered for the purpose of persuading the trier of fact as to the truth of a proposition on which the determination of the tribunal is to be asked, impeachment is that which is designed to discredit a witness, i.e. to reduce the effectiveness of his testimony by bringing forth the evidence which explains why the jury should not put faith in him or his testimony.

State v. Marsh, 141 Idaho 862, 868-69, 119 P.3d 637, 643-44 (Ct. App. 2004).

The district court found that Capone failed the second prong of the Drapeau standard because Mr. Beyer's statement regarding what Mr. Stone said was inadmissible hearsay and would only have been impeaching, not material evidence. (Aug. R., pp. 33-34.) The district court was correct on both counts.

On appeal, Capone first argues that Mr. Beyer's statements regarding what Mr. Stone said constitute non-hearsay as an "admission of a party

opponent." (Appellant's brief, p. 37 (citing I.R.E. 801(d)(2).) Capone is incorrect. Idaho Rule of Evidence 801(d)(2) states, in relevant part:

> **(d) Statements Which are not Hearsay.** A statement is not hearsay if—
>
> (2) *Admission by Party-Opponent.* The statement is offered against a party and is … (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

I.R.E. 801(d)(2).

"The co-conspirator exception has been succinctly described as follows: 'If A and B are engaged in a conspiracy, the acts and declarations of B, occurring while the conspiracy is actually in progress and in furtherance of the design, are provable against A ....'" State v. Caldero, 109 Idaho 80, 85–86, 705 P.2d 85, 90–91 (Ct. App. 1985) (quoting E. Cleary, McCormick on Evidence § 267, at 792 (3d ed. 1984)). Mr. Stone's purported statement was not offered against Capone. It was only offered against Mr. Stone, who was not a party. Further, Mr. Stone's purported statements to Mr. Beyer did not occur in furtherance of any conspiracy. The conspiracy to not report Rachael's death would not be furthered by Mr. Stone telling Mr. Beyer that Rachael's body was not in the river. See, e.g., Caldero, 109 Idaho at 86-87, 705 P.2d at 91-92. The district court was correct in ruling that Mr. Beyer's testimony about Mr. Stone's purported testimony would be inadmissible hearsay.

Mr. Stone's purported statement to Mr. Beyer were also merely impeaching evidence and was not material to Capone's guilt or innocence. On appeal, Capone argues that Mr. Stone's statement is substantive evidence because the jury could understand it to mean there is no body, and therefore no

murder. (See Appellant's brief, p. 38.) Capone argues it is up to the jury to decide what Mr. Beyer's testimony could mean. (Id.) Capone is incorrect. It is up to the district court to make findings on a motion for new trial, and those findings will not be disturbed on appeal absent clear error. See State v. Ames, 112 Idaho 144, 146, 730 P.2d 1064, 1066 (Ct. App. 1986). Capone has failed to show the district court committed clear error in its finding that this statement did not provide evidence material to the crimes charged.

The evidence is also not substantive because the purported statement made by Mr. Stone occurred in July 2013. (See Aug. R. pp. 30-31.) Mr. Stone's testimony at trial was that he continually lied and denied any involvement with Rachael's disappearance and it was only after the preliminary hearing that he decided to confess. (See 9/9/14 Tr., p. 1853, L. 21 – p. 1859, L. 12.) The preliminary hearing occurred from July 30 to August 1, 2013. (R., pp. 248-271.) It was not until November 12 and 20, 2013 that Mr. Stone gave a full interview to investigators. (R., pp. 442-445.) When Mr. Stone made this purported statement to Mr. Beyer in July 2013, Mr. Stone was still lying about his involvement with Rachael's disappearance. This lying would presumably include lying about Rachael's body not being in the river – especially if that is where it was. Mr. Stone's purported statement to Mr. Beyer was not material, it was just part of the lie that Mr. Stone lived for three-and-half years. The district court's finding was correct.

2. Capone Has Failed To Show The District Court Abused Its Discretion When It Found The Evidence Was Not Likely To Produce An Acquittal

The third prong of the Drapeau standard requires a defendant seeking a new trial on the grounds of newly discovered evidence to show that the proposed evidence would have "probably" produced an acquittal if admitted at trial. Drapeau, 97 Idaho at 691, 551 P.2d at 978. The district court found that there was substantial evidence of Capone's guilt and the statement Mr. Stone purportedly made to Mr. Beyer in July 2013 would not have probably produced an acquittal. (Aug. R., p. 34.)

> Further, the Court finds that even had the statement been allowed at trial, there is nothing in the record of this case that indicates this statement alone would have provided sufficient evidence such that the jury would have acquitted the Defendant. There was substantial evidence presented to the jury which supported the finding of guilt in this matter. Therefore, the Defendant has not met the second and third prongs of the *Drapeau* test. The Defendant's motion for a new trial based upon newly discovered evidence is denied.

(Id.) Capone has failed to show the district court's finding was in error. The district court presided over the trial and was familiar with all of the evidence presented. As noted above, this purported statement by Mr. Stone in July of 2013 was simply part of Mr. Stone's denial of his involvement. Capone failed to show that this single purported statement would have impacted the trial, let alone have been sufficient to "probably" produce an acquittal.

The district court properly denied Capone's Motion for a New Trial, and Capone has failed to show otherwise.

CONCLUSION

The state respectfully requests this Court affirm Capone's convictions.

DATED this 6th day of March, 2017.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of March, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

GREG S. SILVEY
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/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd